

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

KEVIN V. BYNG,

Plaintiff,

v.

9: 07-CV-0471
(GLS/DRH)

JAMES L. CAMPBELL; ALBANY COUNTY SHERIFF'S
DEPARTMENT; CORRECTIONAL MEDICAL SERVICES,
INC.; DR. ROBNOWITZ; DR. SALZMAN; RICH, R.N.;
DEBBIE, R.N.; GLORIA COOPER; D. DELONG;
M. ROSE; and JILL HARRINGTON,

Defendants.

APPEARANCES:

OF COUNSEL:

KEVIN V. BYNG
07-A-3241
Fishkill Correctional Facility
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KAREN A. BUTLER, ESQ.
KELLY M. MONROE, ESQ.
WILLIAM C. FIRTH, ESQ.

**DAVID R. HOMER
U.S. MAGISTRATE JUDGE**

REPORT-RECOMMENDATION AND ORDER¹

¹This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

Plaintiff pro se Kevin V. Byng (“Byng”), an inmate in the custody of the New York State Department of Correctional Services (“DOCS”), brings this action pursuant to 42 U.S.C. § 1983; the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., as amended (“ADA”); and the Rehabilitation Act of 1973 (29 U.S.C. § 701, et seq.). Dkt. No. 1. On April 9, 2008, defendants Correctional Medical Services, Inc.; Gloria Cooper; Robnowitz; and Salzman filed a motion to dismiss Byng’s causes of action brought under the Americans with Disabilities Act and the Rehabilitation Act. Dkt. No. 67. By Memorandum-Decision and Order filed on October 20, 2008, this Court granted Byng permission to file an amended complaint which added a new defendant and new claims. Dkt. No. 99. The amended complaint was filed on October 21, 2008. Dkt. No. 100. Defendants Correctional Medical Services, Inc.; Gloria Cooper; Robnowitz; Salzman; and Jill Harrington have submitted an answer in response to the amended complaint. Dkt. Nos. 103, 104, 105. Defendants Correctional Medical Services, Inc.; Gloria Cooper; Robnowitz; Salzman; and Jill Harrington have also filed a motion for summary judgment seeking dismissal of the amended complaint. Dkt. No. 112.

An amended complaint supercedes a prior complaint. Middlebrooks v. Conway, No. 05-CV-0004, 2007 WL 2437118, at *5 n.9 (W.D.N.Y. Aug. 21, 2007). “Typically, the filing of an amended complaint following the filing of a motion to dismiss the initial complaint moots the motion to dismiss.” Brown v. Napoli, No. 07-CV-838, 2008 WL 4507590, at *2 (W.D.N.Y. Sep. 29, 2008) (citing Haywood v. Republic Tobacco, Co., L.P., NO. 05-CV-842A, 2007 WL 1063004 (W.D.N.Y. Apr. 6, 2007)). Because defendants’ motion to dismiss is addressed solely to Byng’s **original** complaint, it is


recommended that defendants' motion to dismiss (Dkt. No. 67) be **denied as moot**.

Conclusion

For the reasons stated above, it is hereby **RECOMMENDED** that defendants' motion to dismiss (Dkt. No. 67) be **DENIED as moot**.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Small v. Sec'y of HHS, 892 F.2d 15 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: December 16, 2008
Albany, New York



United States Magistrate Judge